Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-211

J. C. PENNEY COMPANY, INC., *Petitioner*

v.

THE UNITED STATES DEPARTMENT OF THE TREASURY, ET AL., *Respondents*

Memorandum
of
American Importers Association, Inc.
as Amicus Curiae in Petitioner's Petition for Writ of Certiorari

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By leave of the Court and with the consent of the Government, American Importers Association, Inc., as Amicus Curiae, files this memorandum in support of the J. C. Penney Co.'s petition for writ of certiorari.

1. Organization and Purposes of American Importers Association

American Importers Association (AIA) is a New York nonprofit membership corporation organized in 1921. It is the recognized national association of American importers. AIA's 800 member firms, located all over the land, import a wide variety of manufactures and commodities from almost all countries of the world.

The purpose of AIA is to promote the international commerce of the United States, particularly its import trade, and to encourage the equitable administration of the laws relating to imports. AIA thus has a public obligation to speak for the entire importing trade in seeking proper procedures and correcting procedural deficiencies in this and future antidumping cases.

2. Direct Interest of AIA in This Proceeding

The broad scope of the membership of AIA makes it uniquely qualified to file this memorandum on behalf of the many U.S. importers who will be directly affected by the decision in this case. AIA claims no special knowledge that would enable it to express its opinion on the substantive question of whether exporters of television receiving sets from Japan have been or are engaging in sales at less than fair value (LTFV). But AIA is vitally concerned that the Government's handling of antidumping complaints must be fair and in accord with the requirements of procedural due process as specified both by statute and by the U.S. Constitution. The failure to observe these standards would impose an unwarranted and destructive burden on a substantial segment of American business.

For this reason, AIA has followed with increasing distress the procedural shortcomings of this case at each stage of the administrative process. It is in accord with the description of these procedures appearing in the petition for writ of certiorari which the present memorandum supports.

Unless corrected, the procedural deficiencies which pervade the entire administrative conduct of the Japanese television case will inevitably affect the outcome of that proceeding once it reaches the Customs

Court. More importantly, the injurious procedural precedents which the Government seeks to establish will adversely affect every future antidumping case. U.S. importers would thus be deprived of their constitutional protections against the political predilections of each successive Administration.

Even if the LTFV determination in the television case is eventually reversed as a result of ultimate Customs Court review, the damage done to U.S. importers—measured by the expense, adverse publicity, pricing uncertainties, competitive pressures and disruption of sources of supply that Treasury's action has caused—remains grave and irremediable. Neither in this nor in subsequent cases should importers be subjected to such an inequitable burden.

AIA emphasizes that the U.S. consumer has a direct and important stake in the outcome of this case. The result of the procedural deficiencies in Treasury's conduct of the proceeding is likely to be higher prices, lower quality and reduced availability in the choice of television sets for U.S. consumers. The constitutional shortcomings of the proceeding have thus had a substantially adverse impact on the public interest.

Finally, AIA has a particular interest in this case. It is common knowledge that most importing firms are small and not able—as the petitioner in this case fortunately is able—to undertake the major outlays of money, time and energy required effectively to contest an antidumping decision by the Treasury Department. The case thus affords importers a unique opportunity to press their claim for procedural rights in this field. On behalf of U.S. importers and consumers, AIA has a duty to join in seeking review of governmental action which is oppressive in this case and potentially so in all future antidumping investigations.

The Issue

The Court of Appeals and District Court below did not reach the merits of petitioner's constitutional claim. Rather, the lower courts decided that the subject matter of this suit was not within the jurisdiction of the District Court because it was exclusively within the province of the Customs Court. The correctness of their ruling is the issue in this petition for writ of certiorari.

Discussion

(1) AIA respectfully refers the Court to the petition for writ of certiorari, as well as to petitioner's briefs filed in the courts below. AIA agrees with the analyses and conclusions therein contained. It adopts and incorporates them by reference in this memorandum.

(2) AIA respectfully submits that the case at issue is not one which is within the exclusive province of the Customs Court. The issues involved have nothing to do with substantive customs issues involving the expertise of the Customs Court. Rather, the issues are solely concerned with the proper conduct of an administrative proceeding and petitioner's right to fundamental procedural rights accorded by the Administrative Procedure Act and the U.S. Constitution. These questions are within the traditional expertise of the District Court.

(3) The Government's assertion that the Customs Court has exclusive jurisdiction over any controversy dealing ultimately with Customs duties, no matter how remotely related to the importation of goods, is simply not correct. The numerous precedents cited by petitioner clearly support the proposition that a District Court has immediate jurisdiction to intervene in ad-

ministrative proceedings where the serious nature of the procedural irregularities would cause irreparable injury to a party. The precedents confirm that this jurisdiction exists even where judicial review would normally be vested exclusively in another forum. Those precedents clearly apply here, where the procedural defects are fundamental, the resulting injury is severe and no other remedy is adequate.

(4) The following brief summary of Treasury's conduct of the television proceeding demonstrates the startling absence of procedural safeguards guaranteed by the Constitution:

(a) At no time have the U. S. importers—on whom the full financial burden of the dumping duty ultimately falls—been allowed to examine the specific evidence submitted by domestic complainants or foreign exporters, in order to assess and be prepared to rebut the allegations that dumping has taken place. Rumor and hearsay have been their principal means of obtaining such limited information as they have been able to acquire.

(b) The indefinite and shifting standards applied by Customs and Treasury to determine whether dumping exists have never been adequately disclosed to the U.S. importers. These standards are so imprecise that they enabled Customs originally to conclude that dumping margins were nonexistent or minor, and yet five months later—based on identical evidence—to find that such margins were substantial.

(c) During the pendency of the proceeding, Assistant Secretary Rossides—who is charged with final responsibility for deciding the case on Treasury's behalf—indicated at an unprecedented press conference that he had apparently prejudged the issue of whether LTFV sales had occurred. In a subsequent press conference he stated explicitly that henceforth the Antidumping

Act would be administered on behalf of domestic interests.

(d) The Withholding of Appraisement Notice published by Treasury in the television case left the U.S. importers completely without reasons, explanation, or guidelines as to why the decision to withhold appraisement had been reached.

(e) After the withholding of appraisement, Treasury denied the repeated requests of petitioner and other U.S. importers for a hearing on the record in accordance with the due process clause of the Constitution and the adjudicatory provisions of the Administrative Procedure Act. Petitioner's detailed procedural requests designed to make such a hearing meaningful were also specifically denied.

(f) At a "conference to present views" subsequently held by Treasury, it explicitly repeated its earlier denials of procedural rights. Among other deficiencies, Treasury officials refused to keep a transcript of the meeting or to permit one to be kept. They also refused to answer any questions posed by the parties or to permit the parties to question each other. Despite the fact that Mr. Rossides, the Treasury official responsible for deciding the television antidumping case, knew that there would be no written record upon which he could later rely in making his decision, he did not attend the conference.

(g) The LTFV determination eventually published by Treasury was completely devoid of any information or guidelines that could be used by the U.S. importers in evaluating their position, attempting to comply with the Act or seeking judicial review of Treasury's decision. After two and one-half years of participation in the case, the procedures adopted by Customs and Treasury thus continued to reflect the same fundamental procedural deficiencies.

(5) The U.S. importers have suffered serious and irreparable injury as a result of the procedural shortcomings of the television case. Because Treasury persists in refusing to disclose the facts and standards on which it relies, this injury will continue indefinitely:

First, the U.S. importers will be unable to make informed decisions as to retail pricing since they do not know what customs duties they may ultimately have to pay on imported Japanese television sets, or the criteria by which such duties will be adjusted as market conditions change.

Second, the U.S. importers may well be compelled to revise their prices upward in order to avoid the threat of future dumping duties. Because of their lack of information, they cannot know whether or to what extent such upward revisions—which adversely affect both their market position and the interests of U.S. consumers—may be necessary.*

Third, because Treasury will not disclose the amount of the dumping margins it has allegedly found on specific television sets from specific Japanese suppliers, the U.S. importers dealing with those suppliers are unable to compete knowledgeably with each other, since none knows the extent of dumping duties that may eventually be imposed.

(6) Even if petitioner and other U.S. importers ultimately obtain Customs Court review, the protracted delay inherent in the review procedure precludes an adequate remedy. Moreover, because of Treasury's conduct there is no record of the administrative pro-

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* Domestic television manufacturers have already taken advantage of the anti-competitive implications of Treasury's action by raising their own price, thus causing further adverse effects on U. S. consumers.

ceeding for the Customs Court to review. This fact, coupled with that Court's consistent presumption of the validity of the administrative determination, renders reversal of the LTFV determination virtually impossible. *Never* during the 50-year history of the Antidumping Act has an LTFV determination ultimately been overturned by the Customs Courts.

(7) Finally, the Customs Court has consistently maintained that it lacks equity powers. That court's refusal to grant equitable relief would further undermine judicial review because—for the reasons explained in the pending petition for certiorari—it would deprive the court of any adequate means to compel Treasury to repair the deficiencies of its procedures. Thus, denial of jurisdiction by the District Court effectively leaves petitioner without any forum for review.

CONCLUSION

AIA respectfully submits this memorandum as amicus curiae in support of the J. C. Penney Co., petitioner herein for a writ of certiorari. In view of the considerations stated herein and in the petition, AIA urges that the petition should be granted.

Respectfully submitted,

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